THE PROSECUTOR'S MANUAL
CHAPTER 8
VOIR DIRE

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I. INTRODUCTION

The title of this chapter is, of course, a misnomer. Prosecutors (and defense attorneys) do not select jurors - they eliminate them. Through this process of elimination, certain jurors are left to hear the case who are presumably not predisposed to favor either the prosecution or defense.

Your role in this process is significantly limited by A.R.S., Rules of Criminal Procedure, Rule 18.5d which entrusts the conducting of questioning of jurors as to their qualifications (*voir dire*) to the trial judge. Since the implementation of that Rule in 1973, many prosecutors have decided that jury selection is "pot luck". This attitude is a mistake.

Any experienced trial attorney worth his salt knows that if you leave just one "bad" juror on your jury, your case is lost before you even begin (assuming, as most prosecutors do, that a "hung" jury is a victory for the defense).

By properly assessing your case, your strengths and personality, and then asking the right questions of the potential jurors, you should rarely leave a person on the jury who is predisposed against you or your case.

II. THE EMPANELMENT

The first question a judge often asks is, "how many jurors do we call to the box?"

Your quick and correct response will not only impress the court but also protect a conviction from reversal. If too few jurors are selected to hear the case it may be subject to reversal. *State v. Madison*, 114 Ariz. 221, 560 P.2d 405 (1977) (court properly declared mistrial after jury verdict when it was determined too few jurors were selected). Additionally, if too few jurors are empanelled the state may be foreclosed from seeking the greater punishment). *State v. Soliz*, 223 Ariz. 116, ¶16, 219 P.3d 1045, 1049 (2009).

The number of jurors to be empanelled depends upon the seriousness of the charge and the number of defendants charged.

A. More Than 30 Years Exposure

In non-capital felony cases the defendant is entitled to a jury of twelve if his sentence can possibly be more than 30 years (this includes consecutive terms and and all enhancement options) A.R.S. § 21-102(A); see also *Madison*, *supra*; *Soliz*, *supra* at ¶6, ¶8, 219 P.3d at 1046.

B. Less Than 30 Years Exposure

If the defendant can not receive more than 30 years he is entitled to only eight jurors. A.R.S. § 21-102(B).

C. Peremptory Strikes

In non-capital felony cases the State and defense are each allowed six peremptory challenges. Rule 18.4c.1(ii), Ariz. R. Crim. P.

D. Total For The Box

If the defendant can receive more than 30 years, 24 jurors must be called to the box (12 man jury plus 6 strikes for

each party equals 24 total).

If the defendant can not receive a 30-year sentence only 20 jurors should be called (8-man jury plus 6 strikes per party).

E. More Than One Defendant

If however, there is more than one defendant, each defendant gets half as many strikes as one defendant would have. Rule 18.4(c)(2), Ariz. R. Crim. P.

Therefore, if there are two defendants, the same totals as above apply (three strikes a piece equals six total strikes).

However, where there are more than two defendants you must add three extra jurors (five in a capital case) to the box per additional defendant (e.g. in a case with four defendants, one of whom may get more than thirty years, you must call 30 jurors to the box - each defendant gets three strikes equals twelve total, you get six strikes and the jury is composed of twelve jurors).

III. *VOIR DIRE* QUESTIONS

A.R.S., Rules of Criminal Procedure, Rule 18.5 states that:

> d. The court shall control the *voir dire* examination and shall conduct a thorough oral examination of prospective jurors. In courts of record, *voir dire* shall be conducted on the record. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination. In addition, the court may terminate or limit *voir dire* on grounds of abuse. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination.
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> e. The court shall ensure the privacy of prospective jurors is reasonably protected. The examination of prospective jurors shall be limited to inquiries directed to bases for challenge for cause or to information to enable the parties to exercise intelligently their preemptory challenges.

It is essential to the success of the selection process that you know how your trial judge will construe this rule and handle *voir dire*. Roughly, there are three types.

A. The Judge Asks All Of His Own Questions

Many judges have a stock list of *voir dire* questions which they ask of every jury panel. These judges pay scant attention to the *voir dire* questions submitted by the attorneys. Your best approach with these judges is to just give him a few *voir dire* questions which are very important to you or give him a full list of *voir dire* questions but underline or star the important ones.

Try to get a commitment from the judge that he will ask your questions or allow you to ask them.

After the judge questions the jurors you will often find that this type of judge "forgot" to give your important instructions. At that point the judge will sometimes look at you and ask whether you "pass the panel". Allow the defense attorney to say, "yes", then either:

1. State firmly, "If the court please, I'd like to ask a question (or two) of the entire panel."

- Your first questions, then, should be highly relevant but as innocuous as possible so that the court does not feel you are trying to "sneak" something in. For example: "Ladies and gentlemen, the evidence will show that one of my witnesses was a participant in the crime charged. Would anyone disregard his testimony just because he was involved in the crime? Would you, in fact, be able to assess his truthfulness just as you would any other witness?", etc.

- After your first general questions focus in on your "target jurors" for more specific questions and answers.

- If you have any doubts about whether your judge will allow this procedure (permissible if good cause, per Rule 18.5(d)) or the relevancy of your questions talk it over with an experienced attorney in your office.

- If the judge refuses to allow you to examine you may want to ask if you can approach the bench and explain that "good cause" exists to allow you to examine the jurors in that you anticipate extensive follow-up questions which will vary depending upon the preceding answer given. Explain that it would be extremely awkward to convey each question to the court after each answer.

2. Ask the judge if you may approach the bench. Once at the bench, request that the court ask your questions.

- If the judge then asks your questions it will appear to the jurors that you caught something the defense didn't.

- Even if the judge won't ask (or allow you to ask) your questions it will appear that you, and not the defense, is more in control.

A final note - you must be persuasive, and aggressive with this type of judge or you'll never find out any important information about the potential jurors. If you don't get to ask any important, piercing questions your jury selection will be "pot luck".

B. The Judge Asks A Combination Of His Own And The Attorneys' Questions

This category of judges spans the continuum from those who will ask one or two of your most basic questions (e.g. "Have any of you had an unpleasant experience with an officer, like a traffic ticket, which may affect your impartiality?") to those, who after asking a few *pro forma* questions, will read all of your verbatim. If your judge is of the former variety see Section A. If your judge is of the latter variety, you must take a great deal of time in drawing up your instructions (*see infra*). If your judge asks many or most of the questions submitted by the attorneys, make sure you get a list of the defense questions and object to any which are beyond the scope of permissible examination.

C. The Judge Allows The Attorneys To Ask Their Own Questions

Some judges allow the attorneys to conduct a significant portion or at least some *voir dire*. If you present a case in front of this type of judge you must prepare your questions well to ensure that the procedure works to your benefit rather than defense counsel's.

1. Preliminaries

This is your first introduction to the jurors - make it a positive one. Possibly tell them you and defense counsel do not want to pry into their personal lives but that it is very important both to the defendant and the State that the fairest and most impartial jury possible is chosen.

2. Your Questions

Phrasing is important. Know when to ask questions intended to educate, yes-no questions, and open-ended questions.

3. "Target" Jurors

Usually you will not want to ask questions of the entire jury panel unless your purpose is educational (e.g.: "Do you understand that the State's burden is proof beyond a reasonable doubt - not beyond any doubt, shadow of a doubt or certainty? Does anyone have any problem with that law? Would you be able to follow it in your deliberations?", etc.).

On the other hand, you will usually not want to ask a question to each individual juror. The best way is to pick out "target jurors" and address your questions to them. Target jurors are those you do not want on the jury, i.e., those you will have to strike or those you are uncertain about for jury service.

a. Questioning Jurors You Do Not Want on the Jury

You should principally attempt to elicit responses from these potential jurors which will motivate the trial judge to strike him/her from the panel. That way you won't have to use one of your peremptory strikes against the person.

You must remember that in questioning these jurors that your questions must not go to issues the answers to which might jeopardize your case. For example, if your potential juror is of the same minority race as the defendant and has an extensive record of arrests, do not question him about his feelings about peace officers or he's liable to respond that all cops are liars and the justice system is set-up to railroad the innocent. You are limited only by your creativity in drafting your questions. A suggestion, however, is in order. Think of this as a "pleasant" cross-exam session, i.e., try to phrase most of your initial questions to receive the "yes" or "no" answer you want. An example: You note that your unwanted juror works as a salesman for a small business. He, therefore, is probably not making as much money on jury duty as he would be if working.

Q. Mr. Jones, where are you presently working?

A. I work for Paul Smith's Printing Company.

Q. How many employees in that company?

A. About ten.

Q. What do you do?

A. I'm a salesman.

Q. Do you work mainly on commission?

A. Yes.

Q. I know that it is sometimes a great sacrifice to serve on a jury. Is your company reimbursing you for the salary you are not earning while you serve as a juror?

A. Well, they decided they'd give me my base pay but not commissions I'd have gotten.

Q. Do you have a wife and kids?

A. Yes, wife and two kids.

Q. Would you rather be out working and making money?

A. Yes.

Q. Do you think that you might have trouble concentrating on the proceedings when you'd rather be working?

A. Yes.

Your honor, if defense counsel has no objection, I'd ask that Mr. Jones be excused. (At this time defense counsel is on the horns of dilemma - If he objects, Mr. Jones and maybe the rest of the panel - is going to hate him.)

b. Questioning Jurors You're Unsure Of

The questions asked of these jurors should be open-ended so that you can find out as much as possible about him. Further, you may want to ask questions about the specific matter which concerns you. For example, if the juror was involved in a prior not guilty verdict you may want to know a little about the case.

4. Defense Questions

If defense questions are to be asked, make sure you get a copy of them for purposes of objection. If you don't, a defense attorney will ask the jurors improper questions. See *State v. Smith*, 215 Ariz. 221, 230-231, ¶¶ 40-42, 159 P.3d 531, 540-541 (2007) and Criminal Rules of Procedure, Rule 18.5(e) (comment).

D. Fundamental Questions

In 99% of your cases you will want certain fundamental questions asked. Usually these questions will serve more of an educational purpose than an expectation of response.

1. Consideration of Only the Facts in Evidence

"Do you understand that the jury is to consider only facts placed in evidence by the testimony of witnesses? If you are selected to sit on this jury do you promise that you will consider only that testimony which has been presented to you and those items actually introduced into evidence?"

2. Commitment to Follow the Law

a. Nullification

Most experienced prosecutors have fallen victim to the jury phenomenon of "nullification". Nullification occurs when everyone in the courtroom knows that "technically" the defendant is guilty but the jurors just don't like the State's case.

If, for example, you have a case where the jury will be glad your victim was assaulted, the defendant is charged with possession of a small amount of marijuana, etc., it will be important that the jurors be questioned about their predispositions and informed by the judge of their duty to follow the law. Don't forget, later in closing, to forcefully remind them of their oath and duty to follow the law.

b. Misconceptions about the Law

Similarly, jurors will not understand or appreciate the importance of certain legal concept (e.g.: the felony-murder rule). If possible, explain it to them and find out if they can follow it.

3. Prior Jury Service

If your office does not have access to information as to how and why your jurors previously voted, you might want to try to get such an informational system started.

If you do not have prior jury service information you will want to request that the court ask the jurors about prior service and how they voted.

Do not feel that just because a juror convicted or acquitted in a prior case, he will do so in your case. There are many reasons for hesitation, some are obvious, some are subtle:

a. If the prior case or prosecutor was particularly strong he may expect the same from you. If the prior case was a "dog", he may be more easily persuaded by a solid case than the average juror. If you have doubts about whether to strike a particular juror with prior service see if the judge will allow you to ask the juror about the facts of the prior case and his feelings about it.

b. The jurors' residual feelings about the prior service are usually much more important than the verdict. For example, it is not unusual after a homicide guilty verdict for the juror (usually female) to break down and cry. She may admit on *voir dire* that she regrets having sat on a previous jury. Ask, "Do any of your feelings about your prior jury duty make you feel as if you'd rather not serve on this jury?"

c. Many jurors misstate their actual verdict. This-occurs because the juror forgets the actual verdict or returns a compromise verdict.

4. Views Toward Police Officers

In the vast majority of your cases, the officer will play a major role in conviction (or acquittal). Rarely, if ever, should you present a case without a peace officer as a witness as the officer's appearance alone usually gives the case heightened credibility.

Be sure to find out whether any of the jurors harbor resentment against law enforcement. Even one juror who hates cops or got a ticket that morning will hurt you.

5. Membership in Organizations

Normally, just the status of "belonging" to a group reflects an attitude of socialization which is a positive factor (unless the "group" is the Hells Angels).

Never underestimate the importance of the philosophical bent of various groups and organizations. The phrase "Birds of a feather flock together" is an apt expression of the importance a group philosophy has upon its members.

6. Religious Affiliation

Questions pertaining to religious affiliation are generally improper and irrelevant. Such questions may be proper, however, if the purpose of such questions is to determine whether the religion of a juror permits him to "pass judgment" on another. Deep religious convictions cut both ways. If the issue arises you must ascertain whether the juror is going to be sympathetic (social worker - forgive and forget type), cannot

convict on the basis of one-witness testimony (Orthodox Jew) or fundamentalist (usually good for the State).

7. Issues Peculiar to Your Case

Most prosecutors have a form-list of *voir dire* questions. Although it is well that you look over the list for ideas on questions to ask in *voir dire* it is a big mistake and an exhibition of incompetence to just submit the form list to your trial judge.

Each case has its unique and fundamental issues which you must try to get to the jury in *voir dire*. The following are but a few:

a. One-Witness Cases

"In this case the only person who will testify to the actual commission of the crime is Mr. X. If after his testimony has been given, you believe, beyond a reasonable doubt that the defendant committed the crimes with which he is charged, will you require the State to provide you with additional evidence? Do you understand that it is sufficient for the State to prove through the testimony of this one witness that a crime was committed?"

b. Child Witnesses

"A child of 9 years of age, will testify in this case. Would you give less weight to her testimony than an adult? Do you understand that a child's testimony must be assessed in the same manner as any other witness?"

c. Unusual Defenses

Jurors should be educated on special defenses during *voir dire* if at all possible so that they don't take their eyes off the ball during trial.

In insanity and entrapment defenses, for example, the jurors should be informed what the law is in this area and asked whether they can follow it. (This may be subject to objection as invading the province of the court. See *State v. Molina*, 5 Ariz.App. 492, 428 P.2d 437 (App. 1967). Most lawyers though, believe you have a right to know this information. If the judge sustains an objection to your asking it, request that the judge ask the question.) If the defense attorney has disclosed many inconsistent defenses your mention of one may predispose the jury to look for it and force the defendant's hand or throw him off balance.

E. Special Considerations For *voir dire*

In some, maybe most, of your cases you may want to consider creative tactics to help you in the selection of your jury. The following are but a couple of examples:

1. Bench Conferences with Potential Jurors

You'd be surprised how many potential jurors will not speak in front of all of the other prospective jurors but will tell the judge what's on their mind at the bench. For example, in one case, a potential juror approached the bench and said she had acquaintances who were cops, and she'd never believe a word they said.

You might want to explain this problem to the judge, and his authority to "examine one or more jurors apart from the other jurors". Rule 18.5(d) (comment). See if he'll tell the panel that if they'd like to tell him and the attorneys in private about any biases, prejudices or problems they have, they are welcome to do so by just raising their hand.

2. Distribution of a Questionnaire

A questionnaire given to all jurors can provide a wealth of information in a very short period of time. Additionally, you may find that potential jurors are more candid in writing than orally.

a. Preparation

If you decide that this procedure would be beneficial in your case:

(1) Discuss it with defense counsel well in advance of trial and get him to stipulate to it.

(2) Discuss it with your trial judge. Most judges will approve if done by stipulation.

(3) Submit your questionnaires to the judge as far in advance of trial as possible for his approval.

(4) Type up the allowable questions. Be sure copies are made up for the court's file and for the defense attorney.

(5) Ask the judge to call the panel for late afternoon. That way the court can dismiss the jurors after they finish their answers and you can have the entire evening to prepare for oral *voir dire* the following morning. (Some attorneys even have a few of the "target jurors" handwriting analyzed.)

b. Questions to Include

A questionnaire will allow you to be much more creative than is normally allowed in oral *voir dire*. Take advantage of that. For example, in a sexual assault case you may want to include some of the following:

(1) Have you seen any of the following movies:

a The Accused (Jodie Foster)
b. Thelma and Louise (Geena Davis)
c. E t c .

(2) Have you read any of the following books:

a. Against Our Will-Men, Women and Rape

b. E t c .

(3) What magazines do you subscribe to?

(4) Do you think a girl hitchhiking is "asking for it?"

(5) What groups or organizations do you belong to?

(6) Do you have any bumper stickers? What do they say?

(7) Etc.

3. Attorney *Voir Dire* by Stipulation

If you have a number of questions and follow-up questions you want to ask of individual jurors consider discussing with defense counsel the potential for attorney *voir dire* by stipulation. Many attorneys will love the opportunity.

Then ask the judge if after general *voir dire*, the attorneys, by stipulation, may question the jurors. The judge may refuse.

4. The Purpose of *Voir Dire*

As you write up your *voir dire* questions always keep in mind their purpose.

a. Help Determine Who to Strike

As you write up your *voir dire* questions, always keep in the back of your mind that, what you want to do is determine who to strike, not who you will select.

Many prosecutors, without thinking, ask many questions of the potential jurors which only help the defense determine its strikes. For a simple example, questions in D.W.I. trial such as, "How many of you do not drink?", help the defense more than the prosecutor (unless, of course, someone you were going to strike raises his hand).

b. Help Educate the Jurors

Even in the best of circumstances and your most insistent and piercing questions you'll find that veniremen will be less than candid (that's euphemistic - they'll lie). For that reason you must, if possible, use *voir dire* as a vehicle to educate and tie them to their oaths.

c. Use *Voir Dire* in Your Closing

If you have properly educated the jurors and gotten their promise to follow their oaths on a particularly important point, write the promise down and remind the jurors of it in closing argument.

IV. CHALLENGES FOR CAUSE

A. A.R.S. Rules of Criminal Procedure, Rule 18.5(f)

> At any time that cause for disqualifying a juror appears, the court shall excuse the juror before the parties are called upon to exercise their peremptory challenges. Such a juror shall be excused and another member of the panel shall be called to take the excused juror's place in the jury box and on the clerk's list of jurors when fewer than all of the members of the jury panel have been examined. Challenges for cause shall be made out of the hearing of the jurors, but shall be of record.

In *State v. Goldston*, 133 Ariz. 520, 552 P.2d 1043 (1982), an alternate juror was properly struck after the jury was sworn and before the presentation of evidence, when a challenge for cause became apparent. . The court held that the defendant was not entitled to a particular jury but merely a fair and impartial jury. In *State v. Paris-Sheldon*, 214 Ariz. 500, 509-510, ¶¶25-31, 154 P.3d 1046, 1055-1056 (App. Div. 2 2007), the decision of the trial court to excuse four jurors, two for scheduling conflicts and two drawn by lots, because the case required an eight person jury instead of a twelve person jury, was affirmed

B. A.R.S. Rules of Criminal Procedure, Rule 18.4(b) (Comment)

> A challenge for cause can be based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties.

In addition, a juror may be challenged who:

1. Has been convicted of a felony;

2. Lacks any of the qualifications by law to render a person a competent juror;

3. Is of such unsound mind or body as to render him incapable of performing the duties of a juror;

4. Is related by consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant;

5. Stands in the relationship of guardian and ward, attorney and client, master and servant, or landlord and tenant, or is an employee of or member of the family of the defendant, or of the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

6. Has been a party adverse to the defendant in a civil action, or has complained against or has been accused by him in a criminal prosecution;

7. Has served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information;

8. Has served on the trial jury which has tried another person for the offense charged in the indictment or information;

9. Has been a member of the jury formerly -sworn to try the same charge and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;

10. Has served as a juror in a civil action brought against the defendant for the act charged as an offense;

11. Is on the bond of the defendant or engaged in business with the defendant or with the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

12. Is a witness on the part of the prosecution or defendant or has been served with a subpoena or bound by an undertaking as such;

13. Has a state of mind in reference to the action or to the defendant or to the person alleged to have been injured by the offense charged or on whose complaint the prosecution was instituted, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party;

14. If the offense charged is punishable by death, entertains conscientious opinions which would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror; or

15. Does not understand the English language sufficiently well to comprehend the testimony offered at the trial.

C. Never Use A Peremptory Strike When You Can Challenge For Cause

If a judge tells you to just use a peremptory strike when you're sure the juror should be excused for cause you should cite him to the following language:

> Peremptory challenges form an effective method of assuring the fairness of a jury trial. Hence forcing a party to use his peremptory challenges to strike jurors who should have been stricken for cause denies the litigant a substantial right.

Wasko v. Frankel, 116 Ariz. 288, 569 P.2d 230 (1977), abrogated on other grounds by *State v. Hickman*, 205 Ariz. 192, 68 P.3d 418 (2003) (finding that the curative use of peremptory challenges should be subject to harmless error analysis).

Counsel should not be required to use a peremptory strike when the juror in question should be excused for cause. If a court does not strike a juror for cause and the potential juror is eliminated by use of a peremptory strike, the verdict will only be reversed if the final jury was not fair and impartial. *State v. Kuhs*, 223 Ariz. 376, ¶¶26-27, 224 P.3d 192, 198 (2010).

D. Make the Defense Attorney Use His Peremptory Strikes

Do not allow a judge to excuse for cause a juror upon whom the defense attorney should have to use a peremptory strike. Some judges, for example, will strike for cause those prospective jurors who are acquainted with the prosecutor or his witnesses. The only time a juror should be excused for cause is when, after questioning, he/she cannot decide the case impartially or has doubts about his impartiality. *State v. Berge*, 110 Ariz. 473, 520 P.2d 843 (1974) (acquainted with the prosecutor). *State v. Hill*, 174 Ariz. 313, 319-321, 848 P.2d 1375, 1381-1383 (1993) (potential juror, a police officer, who knew prosecutor could still be fair and impartial).

V. PEREMPTORY CHALLENGES

After *voir dire,* you will be given the list of potential jurors remaining on the panel in order to exercise your strikes.

A. General Rules For Prosecutorial Selection

The touchstone of analysis in determining who to strike must be, of course - is this juror more likely to identify with the defense (defendant, defense attorney, theory of defense case, etc.) than with the State? Generally, those people who have little or no stake in the community (or society) or are very liberal are predisposed toward the defense.

B. Subjective Criteria

Most prosecutors have their own subjective categories of people they almost always strike. Although generalities are dangerous, the following list represents a sampling of the types of people a majority of prosecutors prefer to leave off the jury.

1. Those under 30 years of age (especially those under 25and particularly those in college studying liberal arts or related subjects). In the immortal words of Winston Churchill, "Anyone under 30 who is not a liberal has no heart; anyone over 30 who is not a conservative has no brains." Usually the young side with the defendant, unless they have been in the "real world" long enough to have a "stake" in it.

2. Any profession that starts with a "P" (e.g. "Pshrinks").

3. Professions which tend to believe criminals are victims of their environment (e.g. social workers).

4. Professions which do not live in the "real world" (e.g. teachers - unless they instruct in the "blackboard jungle").

C. Minority Jurors

Prosecutors may not strike jurors for the reason that the jurors are the same race as defendant. Prosecutors must have reasons other than race for striking minority race jurors. *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712 (1986); *State v. Tubbs,* 155 Ariz. 533, 747 P.2d 1232 (App. Div. 1 1987) (lack of eye contact and worked for same employer as defendant); *State v. Garcia*, 224 Ariz. 1, ¶¶ 20-27, 226 P.3d 370, 378-379 (2010)

(prosecutor used peremptory strike because potential juror lacked high school education and could not read English). See also *State v. Gay*, 214 Ariz. 214, ¶¶16-19, 150 P.3d 787, 793-794 (2007) (where the trial court did not err in denying defendant's *Batson* challenge because it believed that the prosecutor's reasons for striking two minority jurors were facially race-neutral.)

Failure to use all of your peremptory strikes, resulting in a member of a minority race being left off of the jury, does not, by itself, establish a *prima facie* showing of purposeful discrimination. *State v. Paleo*, 200 Ariz. 42, 45, 22 P.3d 35, 38 (2001). However, it may be a factor in establishing a prima facie case of discrimination. *Id.* at 44.

The Defense is also limited by *Batson* and cannot strike jurors because of their sex, race, or other prohibited factors. *Rivera v. Illinois*, 556 U.S. ---, ---, 129 S.Ct. 1446, 1452 (2009).

D. Objective Criteria

Obviously, the subjective criteria are unworkable in a lot of cases. Even the most dogmatic prosecutor, for example, would not strike the "hippie" looking college coed who hitchhikes to class every day if the case involves a victim who was sexually assaulted after hitchhiking.

Possibly more helpful in deciding what jurors you do not want is a thoughtful analysis of the following criteria:

1. The crime charged;
2. The defense attorney and his personality;
3. Age, looks, affluence of the defendant;
4. Your witnesses;
5. Their witnesses;
6. Your personality;
7. The defense theory; and
8. Your theory.

VI. NOTETAKING AND WATCHING THE JURORS

A. Notetaking

Get a simple system of note taking set up before trial - pluses or minuses, scales of 1-10 or whatever works best for you.

1. Picture of Courtroom and Panel

A picture of the seating arrangement of the panel is indispensable. If your office does not have these diagrams talk to the bailiff the day before trial and draw your own seating arrangement for the panel.

2. Limit your Writing to Short-Hand or symbols

Because you do not select the jurors you want - you eliminate those you do not want - it is more important that you make notes on those you are considering striking rather than those you like.

3. Initial Impressions

Never underestimate the importance of initial impressions. Although these impressions should not give rise to irrebutable presumptions, they should rise at least to a level of presumptions which should be affected only by information to the contrary. There are reasons behind your hunches even if they are not articulable.

Your initial impressions of a juror as he/she goes to the box should be expressed with a simple symbol right below his/her name. For example, if John Jones is called and you note from the jury service that he should probably be struck, you may want to make a check mark. If he has one bad characteristic (prior not guilty); two checks if two bad characteristics (works for same employer as defendant) and three checks with three bad traits (makes positive eye contact with the defendant). Seldom should you be forced to leave someone on with two checks.

If you are initially unsure about the juror, put a question mark. If the juror looks good, put a plus or a star.

After the panel has been selected, watch the jurors closely, especially those whom you question whether you want. Try to see if they have a book with them and, if so, what the title is. Watch their reaction to the judge's questions.

Do not be convinced that a juror's eye contact with you is a good sign. Some jurors find out that eye contact will help them get chosen and, therefore, do it to find out.

4. Notetaking by Jurors

Either prior to or during the jury selection, you should decide whether you want the jurors to take notes.

Prosecutors disagree on the importance and wisdom of the jurors' taking notes. If you decide to request that the judge instruct the jury on this point you should cite Rule 18.6d. If the judge does not like to allow note taking because the jurors might miss something, you may want to urge the mandatory implications of the rule:

> The court shall instruct the jurors that they may take notes regarding the evidence presented. The court shall provide materials suitable for this purpose. In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by jurors during trial to aid them in performing their duties. Jurors shall have access to their notes and notebooks during recesses and deliberations. After the jury has rendered its verdict, the notes shall be collected by the bailiff or clerk who shall destroy them promptly. In a capital case, the jurors shall have access tot heir notes from the trial and all phases of the sentencing proceedings until the jury renders a penalty verdict or is dismissed.

A.R.S. Rules of Criminal Procedure, Rule 18.6(d).

In determining whether you want the jurors to take notes, you might want to consider the following variables as well as some others your colleagues can dream up:

a. Juries almost always defer to their members who have taken notes when it comes to issues of recollection. If you make the mistake of or are forced into leaving a sociology professor on the jury, he is sure to take notes and may end up making a "mountain out of a mole hill" or misstating some evidence which will hurt you.

b. If your trial is long with many details which the jurors will have to tie together, you may want them to take notes. On the other hand, if the issues boil down to one or two, the notes may just confuse them. Jurors tend to believe that whatever they wrote down must be important, otherwise, why would they have noted it?

c. If you feel your case is very strong and you will "control" the trial, consider not adding this variable which might hurt you.

If your jury is given note pads, be sure to tell them in opening what points are important to your case, and try to watch (or get somebody to watch) when they're taking notes, so you'll know what they consider to be important.

B. Watching The Jurors

Voir dire presents an opportunity for you to look at your potential jurors. Don't get so engrossed in your note taking that you miss the chance to watch the jurors and view their mannerisms. The way that an answer is given can be every bit as informative as the words that are used in the answer.

Watch the jurors outside the courtroom, too. See how they inter-act with others out in the hall, in the elevator, etc.

Almost all experienced prosecutors develop a sixth sense about jurors, not only in how to select them, but in gaining rapport. This is gained by always being aware of the jury's presence during the trial.